[2019] UKFTT 688 (TC)

# TC07461

*SDLT – whether discovery – whether subsale relief applied – if so, whether caught by retrospective provision in s 45(3A) of FA 2003 – if not, whether within the anti-avoidance provision in s 75A – HMRC succeeded on all grounds – appeal refused and assessment confirmed*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**Appeal number: TC/2017/09201**

**BETWEEN**

**DAVID SIMBARASHE NEWTON AND ELIZABETH ANN NEWTON-YOUNG** **Appellant**

**-and-**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE ANNE REDSTON**

**Sitting in public at the Tribunal Centre, Taylor House, Rosebery Avenue, London on 1 and 2 October 2019**

**Mr Julian Hickey of Counsel, instructed by Levy & Levy LLP, for the Appellants**

**Miss Elizabeth Wilson of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

### INTRODUCTION

1. In October 2012, Mr Newton and Mrs Newton-Young ("the Appellants") entered into a Stamp Duty Land Tax ("SDLT") avoidance scheme ("the scheme") designed by Cornerstone Tax ("Cornerstone").

2. The relevant SDLT legislation is in Finance Act 2003, either as originally drafted or as amended. In this Decision, all references to legislation are to that Act, unless otherwise specified, and all legislative provisions are cited only so far as relevant to the issues raised by the appeal.

3. The Appellants entered into the scheme because they wanted to avoid £23,400 of SDLT on the purchase of a house in Milton Keynes ("the Property") from a Mr and Mrs Mills ("the Vendors"). Around 100 other appeals have been informally stayed behind that of the Appellants.

4. The scheme relied on sub-sale relief. Put simply, this relief applies when the first purchaser on-sells to second purchaser without the first contract having been completed or, in the alternative, having been "substantially performed".

5. It was the Appellants' case that a company registered in the British Virgin Islands ("BVI") called Property Futures Ltd ("PFL") was the second purchaser, and that no SDLT was due on the Appellants' purchase of the Property.

6. HMRC's case was that the scheme failed, because (a) sub-sale relief did not apply on the facts, and even if it did, (b) the scheme was caught by s 45(3A), which had retrospective effect, or (c) the scheme was within the anti-avoidance provision at s 75.

7. I agree with HMRC on all of those points, for the reasons set out in the main body of this Decision. I also agree with HMRC that the "discovery" provisions at Sch 10, Part 5 were met. As a result, I dismiss the Appellants' appeal and uphold the assessment.

### THE STRUCTURE OF THIS DECISION

8. This Decision first discusses the procedural issues which arose concerning the Appellants' failure to attend the hearing, see §9 to §19. The remainder of the Decision is organised as follows:

(1) The evidence before the Tribunal, see §20 to §28.

(2) The First Issue: whether the Discovery provisions were satisfied, see §29 to §65.

(3) Findings of fact in relation to the other substantive issues, see §66 to §89.

(4) The Second Issue: the Contract between the Appellants and PFL, and the effect of the Rider to that Contract, see §90 to §119.

(5) The Third Issue: whether subsale relief applies, see §120 to §139.

(6) The Fourth Issue: whether the arrangements are within s 45(3A), see §140 to §150.

(7) The Fifth Issue: whether the arrangements are caught by s 75A, see §151 to §172.

**THE APPELLANTS' FAILURE TO ATTEND THE HEARING**

9. Before the beginning of a hearing, the Tribunal is provided with a single A4 page headed with the words "Tax Hearing Attendance Record" in bold capitals. Before it is handed to the Judge:

(1) the Tribunal clerk has completed the first part of the document with the case name, the name of the judge, the date of the hearing; and the case reference number; and

(2) the clerk has then given the document to the parties or their representatives, and asked them to complete the second part. This is split into two columns, one headed "For Respondents:" and the other "For Appellant:". Under the "For Appellant:" heading are a number of boxes; the first two are labelled "Appellant" and "Counsel".

10. In this case, the Tribunal clerk carried out (1) above by inserting the names "David Newton and Elizabeth Newton-Young" next to "case name". In relation to (2), under the "For Appellant" heading, the box labelled "Appellant" had been completed with the words "Mr and Mrs Newton".

11. The hearing room was full, with around 25 people attending. I understood, from the completion of the Appellant box on the hearing attendance record, that the Appellants were among the people in the hearing room, and the hearing began.

12. During the afternoon of the first day of the hearing, Miss Wilson mentioned in passing that neither Appellant was present, and Mr Hickey confirmed this. When I referred to the hearing attendance record, he apologised, saying he had incorrectly inserted the Appellants' names because he had misread that form.

13. I drew the attention of both Counsel to Rule 33 of the Tribunal (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). This is headed "hearings in a party's absence" and reads:

> "If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing."

14. I asked for any relevant evidence or submissions. Miss Cooper from Cornerstone, the Appellants' accountant, said she had spoken to Mr Newton the preceding Friday. He had confirmed that neither he nor Mrs Newton-Young wanted to attend the hearing, but asked that it continue in their absence.

15. Both Counsel submitted that it was in the interests of justice to proceed with the hearing, and that this had also been the position when the hearing began: at that time, they were aware the Appellants were not present. In particular, they asked me to decide that that the interests of justice were satisfied because:

(1) the Appellants wanted the case to proceed in their absence and had given instructions to that effect;

(2) the issues in this case were essentially questions of law;

(3) the Appellants had never provided witness statements, so this was not an appeal where a witness of fact had not attended.

16. In deciding whether to (a) adjourn and relist, or (b) continue with the hearing, I took into account all the matters in the previous paragraph, and also Rules 2 and 7 of the Tribunal Rules. Rule 2 is headed "Overriding objective and parties' obligation to co-operate with the Tribunal" and reads:

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues.
>
> (3) The Tribunal must seek to give effect to the overriding objective when it—
>
> (a) exercises any power under these Rules; or
>
> (b) interprets any rule or practice direction.
>
> (4) Parties must—
>
> (a) help the Tribunal to further the overriding objective; and
>
> (b) co-operate with the Tribunal generally."

17. Rule 7 is headed "Failure to comply with rules etc", and begins:

> "(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction does not of itself render void the proceedings or any step taken in the proceedings.
>
> (2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Tribunal may take such action as it considers just, which may include—
>
> (a) waiving the requirement;
>
> (b) requiring the failure to be remedied;
>
> (c) exercising its power under rule 8 (striking out a party's case); (
>
> d) restricting a party's participation in proceedings; or
>
> (e) exercising its power under paragraph (3)."

18. Although Rule 33 does not explicitly state that the Tribunal should consider, at the beginning of the hearing, whether to proceed in the absence of an appellant, it is in my judgment the natural reading of that Rule, and therefore begin the hearing without considering that

question is an "irregularity". I also find that Rule 7 is broadly drafted, applying not only to the parties but to the Tribunal itself.

19. I decided that it would be fair and just to continue with the hearing, and that I should exercise the discretion given by Rule 7(2), because:

(1) the Appellants were aware of the hearing and Mr Newton had asked that the hearing proceed in their absence;

(2) Mr Newton had told Cornerstone that this was also the view of his wife, and Cornerstone had reasonably accepted that he was correctly communicating her wishes;

(3) the Appellants were not witnesses in the appeal;

(4) both parties had Counsel, and those instructing them were also present, so relisting the hearing would result in significant extra costs;

(5) relisting would also delay the resolution of the appeal, almost certainly into 2020, given both judicial availability, and the availably of Counsel and their instructing parties;

(6) relisting would negatively impact other Tribunal users, see the comments of Davis LJ in *Chartwell Estate Agents v Fergies Properties* [2014] EWCA Civ 506 at [28];

(7) both parties had been aware from the beginning of the hearing that the Appellants were not present, so were not proceeding on a false premise;

(8) both parties wanted the hearing to continue;

(9) the irregularity had come about because of an accidental error by the Appellants' Counsel; and

(10) had I been aware of the Appellants' absence at the beginning of the hearing, I would have decided to proceed in their absence, because of points (1) to (6) above.

## THE EVIDENCE

20. The Tribunal was supplied with a helpful Bundle of documents, which included:

(1) correspondence between Cornerstone and the Appellants; between HMRC and the Appellants; and between HMRC and Cornerstone;

(2) correspondence between the parties and the Tribunal;

(3) HMRC's Guidance Notes entitled "How to complete a paper land transaction return" dated April 2011, which both parties accepted had been current at the time of the disputed transactions; and

(4) various documents relating to the scheme transactions; these are discussed later in this Decision.

21. Ms Hickey, the Revenue Officer who issued the assessment at issue in this appeal, provided a witness statement, gave evidence in chief led by Miss Wilson, and was cross-examined by Mr Hickey (no relation). I found her to be an entirely honest and credible witness.

### Mr Kotze's witness statement

22. Mr Kotze, the conveyancing solicitor who acted for PFL, provided a witness statement dated 2 September 2018, but did not attend the hearing. Mr Hickey said that he had been told by those instructing him that Mr Kotze had failed to attend despite repeated reminders and

encouragement, and was currently overseas and could not be reached. Mr Hickey asked that his witness statement be admitted.

23. Miss Wilson objected. She referred in particular to Direction 8 of the Directions issued by Judge Poole on 11 April 2018, which reads "any party seeking to rely on a witness statement …must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute)".

24. I decided that it was in the interests of justice to admit Mr Kotze's witness statement, but that if any of the evidence contained in it was challenged by Miss Wilson, it was unlikely that I would accord weight to those points unless they were supported by other reliable evidence.

**The letter from Ms Jones**

25. Mr Hickey also referred to a letter to the Tribunal from Ms Caroline Jones, a solicitor at Hillyer McKeown, dated 7 September 2018. Ms Jones had acted for the Appellants in relation to the transaction.

26. Mr Hickey said he understood from those instructing him that Ms Jones had been asked to attend the hearing and give evidence but had refused; however, she had agreed to write this letter. He asked that it be treated as a witness statement. Miss Wilson objected, saying that the letter was not a witness statement; the Tribunal had made specific directions about witness evidence, and this letter did not meet those requirements.

27. I agreed with Miss Wilson. Direction 2 of Judge Poole's 11 April 2018 Directions, as amended on 5 June 2018, required each party to file and serve "statements from all witnesses on whose evidence they intend to rely", and the Appellants had to comply with that direction by 42 days after 30 June 2018. On 30 June 2018, Judge Poole further directed that "no witness whose witness statement has not been delivered in accordance with [those directions] shall be permitted to give evidence at the hearing". Even if Ms Jones's letter were to be treated as a witness statement, she had not attended the hearing, and so was not available for cross-examination as required by Direction 8. Taking all those matters into account, I decided to refuse Mr Hickey's application that the letter be treated as a witness statement.

28. Miss Wilson had not applied for the letter to be excluded from the Bundle, and said she was content that it remained on the basis that it was a letter to the Tribunal about this appeal. I told both parties that any points of fact in that letter disputed by HMRC were unlikely to be accepted by the Tribunal unless they could be substantiated by other evidence. As it turned out, Mr Hickey sought to rely on only one statement in Ms Jones's letter, see §40.

**THE FIRST ISSUE: DISCOVERY**

29. HMRC were out of time to open an enquiry into the Appellants' SDLT return, and so made the assessment under the "discovery" provisions in Sch 10, Part 5. The first issue was whether HMRC satisfied those provisions.

30. On the basis of the documentary evidence before the Tribunal, and in the context of that issue, I make the following findings of fact. I make further findings of fact at §66ff.

**Findings from documentary evidence**

31. On 23 October 2012, HMRC received an SDLT1 form in relation to the transfer of the Property ("the/this SDLT1"). The vendors were named as Mr and Mrs Mills. The purchasers were named as Mr Newton and Mrs Newton-Young. Box 57 asked "is the purchaser acting as a trustee" and the "No" box has been checked. Hillyer McKeown was named as the purchasers' agent.

32. In answer to the question "are you claiming relief?", the "Yes" box was checked. Underneath, the form required those who checked "Yes" to provide the "Code" from the Guidance Notes. Those Notes list 32 Codes, including charities relief, right to buy relief, group relief and others. Code 28 is "other relief", and that was the code entered on the Appellants' SDLT1. For all Codes other than Code 28, the Guidance Notes cross-refer to chapters in HMRC's SDLT Manual.

33. Boxes 10 and 12 of the SDLT1 stated that the total consideration was £585,000 paid in cash. Box 13 asked "is this transaction linked to any other", and the "No" box was checked. Box 14 required "the total amount of tax due for this consideration" and a zero had been inserted.

34. SDLT1 forms have no "white space", so any additional information has to be provided by an accompanying letter. No such letter was provided by or on behalf of the Appellants.

35. The copy of this SDLT1 in the Tribunal Bundle has the date 14 March 2014 printed at the top. Ms Hickey explained the reason for this during her evidence-in-chief, see §39.

36. On 4 August 2015, the Appellants received a letter from Mrs Harrison of HMRC's Counter-Avoidance Enquiry Team, headed "Discovery Assessment under Paragraph 28, Schedule 10, Finance Act 2003: acquisition of [the address of the Property]". The text reads "This assessment covers an additional liability omitted from your [SDLT] return…discovered following the expiry of the enquiry period". The assessment was for £23,400, being 4% of the £585,000 consideration shown on the SDLT1.

**Findings from Ms Hickey's evidence**

37. Ms Hickey's unchallenged evidence was that Code 28 is a "general" code, used for all situations not covered by specific Codes; in practice it is also used by those who do not know the correct code. For example, a lot of Code 28 SDLT returns are filed by divorcing couples when one of the assets being transferred is the matrimonial home. Each year, relief is claimed under Code 28 in thousands of SDLT returns, for many different reasons.

38. At some point before March 2014, HMRC became aware that SDLT1 forms submitted by those using certain avoidance schemes were using the Code 28 relief, and set up a project team. HMRC clerical staff first identified all SDLT forms where (a) the consideration was above the SDLT threshold, but (b) no SDLT was said to be due in reliance on Code 28 relief. That subset of data was then run against a list of "indicative agents", with any resulting returns being printed out for review by an HMRC case worker. Ms Hickey's unchallenged evidence was that an "indicative agent" was one which had been "regularly involved" in stamp duty or SDLT avoidance, and that the list had been built up over many years.

39. On 14 March 2014, the Appellants' SDLT return was selected using that methodology, and added to those which required review by a case worker: that is the reason for the printed date at the top of the SDLT return contained in the Bundle.

40. Mr Hickey did not challenge Ms Hickey's evidence that this was what had happened, nor that it was the process described above which had led to the Appellants' SDLT return being selected. However, after the conclusion of Ms Hickey's evidence, he drew my attention to Ms Jones's letter, referred to at §25ff. This includes the statement that Hillyer McKeown "does not in any way involved itself in the design, marketing or selling of tax schemes of any nature or description". Mr Hickey asked me to find that this was correct.

41. I refused to do so, because it was clear from Ms Hickey's unchallenged evidence that:

(1) the project team only printed off SDLT1s which had certain characteristics, one of which was that they were filed by an "indicative agent"; and

(2) the Appellants' SDLT1 was identified through that process.

42. I instead find as a fact that Hillyer McKeown was classified as an indicative agent by HMRC. That is a necessary inference from Ms Hickey's evidence. I place no weight on the statement in Ms Jones's letter, for the reasons explained at §27-28. Ms Hickey also gave unchallenged evidence that she had checked the records held by HMRC's Counter Avoidance team, and these showed that Hillyer McKeown were "acting on behalf of a number of known users of SDLT avoidance schemes".

43. Returning to the chronology, Ms Hickey had joined HMRC's Counter-Avoidance directorate in 1 June 2014, moving there from another part of that organisation. She was asked to review some of the SDLT1 returns which had been printed off as part of the Code 28 project; the Appellants' SDLT1 was referred to her on 27 July 2015. She carried out the following checks on the SDLT1, all of which were negative:

(1) whether there had been any independent disclosure, for instance in a covering letter, explaining why Code 28 had been used;

(2) whether there was a connection between the Vendors and the Appellants, as that might have explained the use of the Code;

(3) whether HMRC's systems held a separate same day land transaction to indicate an onward sub-sale of the Property to another party; and

(4) whether the Appellants had filed an amendment to the SDLT return after the introduction of retrospective legislation by FA 2013, s 194.

44. Ms Hickey also noted that the lack of a separate same day land transaction was consistent with Box 13, which stated that the transaction was "not linked to any other".

45. Having carried out those checks, she concluded that the statutory requirements for the issuance of a discovery assessment had been met, and it was issued.

**The legislation and case law**

46. Sch 10, para 28 is headed "Assessment where loss of tax discovered" and reads:

> (1) If the Inland Revenue discover as regards a chargeable transaction that

(a) an amount of tax that ought to have been assessed has not been assessed, or

(b) an assessment to tax is or has become insufficient, or

(c) relief has been given that is or has become excessive,

they may make an assessment (a "discovery assessment") in the amount or further amount that ought in their opinion to be charged in order to make good to the Crown the loss of tax.

(2) The power to make a discovery assessment in respect of a transaction for which the purchaser has delivered a return is subject to the restrictions specified in paragraph 30."

47. Paragraph 30 is headed "restrictions on assessment where return delivered" and reads:

"(1) If the purchaser has delivered a land transaction return in respect of the transaction in question, an assessment under paragraph 28…in respect of the transaction

(a) may only be made in the two cases specified in sub-paragraph (2) and (3) below, and

(b) may not be made in the circumstances specified in sub-paragraph (5) below.

(2) The first case is where the situation mentioned in paragraph 28(1)…is attributable to fraudulent or negligent conduct on the part of

(a) the purchaser,

(b) a person acting on behalf of the purchaser, or

(c) a person who was a partner of the purchaser at the relevant time.

(3) The second case is where the Inland Revenue, at the time they

(a) ceased to be entitled to give a notice of enquiry into the return, or

(b) completed their enquiries into the return,

could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 28(1) or 29(1).

(4) For this purpose information is regarded as made available to the Inland Revenue if

(a) it is contained in a land transaction return made by the purchaser,

(b) it is contained in any documents produced or information provided to the Inland Revenue for the purposes of an enquiry into any such return, or

(c) it is information the existence of which, and the relevance of which as regards the situation mentioned in paragraph 28(1)…

(i) could reasonably be expected to be inferred by the Inland Revenue from information falling within paragraphs (a) or (b) above, or

(ii) are notified in writing to the Inland Revenue by the purchaser or a person acting on his behalf.

(5) No assessment may be made if:

(a) the situation mentioned in paragraph 28(1)…is attributable to a mistake in the return as to the basis on which the tax liability ought to have been computed, and

(b) the return was in fact made on the basis or in accordance with the practice generally prevailing at the time it was made."

48. These provisions are similar to those in the Taxes Management Act 1970, s 29. In particular, TMA s 29(1) reads:

"If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment:

(a) that any [income which ought to have been assessed to income tax…have not been assessed, or …

the officer or, as the case may be, the Board may…make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax."

49. TMA s 29(5) provides that HMRC may make a discovery assessment if:

"the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above."

50. TMA s 29(6) reads:

"For the purposes of subsection (5) above, information is made available to an officer of the Board if

(a) it is contained in the taxpayer's return under section 8 of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board."

51. Both parties agreed that, in relation to the issues I had to decide, there were no material differences between TMA s 29(5) and Sch 10, para 30(3).

52. The parties also agreed that the summary set out in *Beagles v HMRC* [2018] UKUT TCC ("*Beagles*") (Birss J and Judge Greenbank) at [100] was an accurate summary of the case law

as it applied to TMA s 29(5), by reference to the earlier authorities, namely *Lansdowne Partners LP v R&C Commrs* [2012] STC 544; *Sanderson v R&C Commrs* [2016] STC 638 and *Langham v Veltema* [2002] STC 1557.

53. In *Beagles* at [39] the Upper Tribunal ("UT") noted that, although Park J's decision in the *Langham v Veltema* case was reversed on appeal, his summary in paragraphs [13] to [15] was unaffected by that reversal, and had been expressly followed by Henderson J in *R&C Commrs v Household Estate Agents Ltd* [2008] STC 2045 at [28] to [29].

54. The passage from *Beagles* relied on by the parties reads:

> "(1) The test in s29(5) is applied by reference to a hypothetical HMRC officer not the actual officer in the case. The officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law.
>
> (2) The test requires the court or tribunal to identify the information that is treated by s29(6) as available to the hypothetical officer at the relevant time and determine whether on the basis of that information the hypothetical officer applying that level of knowledge and skill could not have been reasonably expected to be aware of the insufficiency.
>
> (3) The hypothetical officer is expected to apply his knowledge of the law to the facts disclosed to form a view as to whether or not an insufficiency exists (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [23]). We agree therefore with Mr Firth that the test does assume that the hypothetical officer will apply the appropriate level of knowledge and skill to the information that is treated as being available before the level of awareness is tested. The test does not require that the actual insufficiency is identified on the face of the return.
>
> (4) But the question of the knowledge of the hypothetical officer cuts both ways. He or she is not expected to resolve every question of law particularly in complex cases (Patten LJ, *Sanderson* [23], *Lansdowne* [69]). In some cases, it may be that the law is so complex that the inspector could not reasonably have been expected to be aware of the insufficiency (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [17(3)]).
>
> (5) The hypothetical officer must be aware of the actual insufficiency from the information that is treated as available by s29(6) (Auld LJ, *Langham v Veltema* [33]-[34]; Patten LJ, *Sanderson* [22]). The information need not be sufficient to enable HMRC to prove its case (Moses LJ, *Lansdowne* [69]) but it must be more than would prompt the hypothetical officer to raise an enquiry (Auld LJ, *Langham v Veltema* [33]; Patten LJ, *Sanderson* [35]).
>
> (6) As can be seen from the discussion in *Sanderson* (see [23]), the level of awareness is a question of judgment not a particular standard of proof (see also Moses LJ in *Lansdowne* [70]). The information made available must 'justify' raising the additional assessment (Moses LJ, *Lansdowne* [69]) or be sufficient to enable HMRC to make a decision whether to raise an additional assessment (Lewison J in the High Court in *Lansdowne* [2011] STC 372 at [48])."

**Submissions by Miss Wilson on behalf of HMRC**

55. Miss Wilson accepted that the burden of proof in relation to discovery rested on HMRC. She submitted that it was clear on the facts that a discovery had been made by Ms Hickey when

she carried out her enquiries into this SDLT1, and there could be no question of "staleness" given that Ms Hickey began her enquiries after the form was referred to her on 27 July 2015 and the assessment was issued on 4 August 2015.

56. With reference to Sch 10, para 30, she said that the hypothetical HMRC officer with the relevant characteristics could not "have been reasonably expected, on the basis of the information made available" to HMRC before that time, to have been aware of the SDLT insufficiency, because:

(1) the information on the SDLT return was insufficient – Code 28 covered a multiplicity of different situations, and if relief had been rightly due, there would have been no SDLT;

(2) the indicative agent list was not "information regarded as made available" to HMRC within the meaning of para 30(3) and (4), because it was obviously not "contained in" this SDLT1;

(3) no "documents [were] produced or information provided" by or on behalf of the Appellants, so as to engage para 30(4)(b); and

(4) the Appellants' participation in an SDLT avoidance scheme could not "reasonably be expected to be inferred" from the fact that Hillyer McKeown was named as the agent on the SDLT return, because indicative agents, like other agents, filed SDLT returns claiming Code 28 relief for reasons other than the implementation of tax avoidance schemes.

57. It followed that HMRC needed to make further enquiries before they could know where or not insufficient SDLT had been paid. She submitted that this was "a very clear case" where the conditions for a discovery assessment had been met.

**Submissions by Mr Hickey on behalf of the Appellants**

58. Mr Hickey accepted that HMRC had made a discovery and that it was not "stale". However, in his submission the reasonable officer should have realised there was an insufficiency and made an assessment, because:

(1) the following information had been included on the face of the SDLT return:

(a) the value of the property, which was clearly above the SDLT threshold;

(b) the zero figure for SDLT;

(c) Code 28;

(d) the filing of the return by Hillyer McKeown; and

(2) Hillyer McKeown was an indicative agent.

**Discussion**

59. I agree with the parties that I should follow the case law summarised in *Beagles* at [100]. Although it was not strictly binding on me, the SDLT provisions are essentially identical to those in TMA s 29.

60. The test I have to apply is therefore by reference to a hypothetical HMRC officer with the characteristics of an officer of general competence, knowledge or skill; this includes a reasonable knowledge and understanding of the law.

61. I must identify the information that is treated by para 30(4) as available to the hypothetical officer at the relevant time. In relation to subpara (a), the information contained in this SDLT1 was, as Mr Hickey said:

(1) the value of the property;

(2) the zero figure for SDLT;

(3) the use of Code 28; and

(4) the filing of the return by Hillyer McKeown

62. I agree with Miss Wilson, for the reasons she gave, that the hypothetical officer could not have been reasonably expected to be aware, from that information, that there was an insufficiency. Furthermore:

(1) in relation to para 30(4)(b) and (c)(ii), no documents were produced and no information was provided by or on behalf of the Appellants to HMRC; and

(2) in relation to para 30(4)(c)(i), I considered whether Hillyer McKeown's inclusion on HMRC's list of indicative agents was information the existence of which, and the relevance of which as regards the insufficiency, could reasonably be expected to be inferred by the hypothetical officer from the information on the SDLT return. The answer to that question is clearly no. The hypothetical officer could not know from the information on the Appellants' SDLT return that Hillyer McKeown was an indicative agent. The officer could only find this out by consulting an internal HMRC source. By way of contrast, in *Charlton v R&C Commrs* [2013] STC 866, where the taxpayer had included on the face of his return a Scheme Reference Number issued under the Disclosure of Tax Avoidance Scheme legislation, the UT decided that the hypothetical officer would have realised from that number that the taxpayer had entered into an avoidance scheme, and would also have realised that details of the scheme would be set out on the related form filed by the scheme promoter.

63. In summary, the hypothetical officer could not be expected to be aware of the insufficiency in the assessment either from information on the SDLT return, or from anything which could reasonably be expected to be inferred from that information.

64. For completeness I add that, even if the hypothetical officer had been able to infer from the information on the return that Hillyer McKeown was an indicative agent, that would not have caused the officer to be aware of the insufficiency. That is because, as Miss Wilson said, indicative agents will also file SDLT returns on which relief is claimed under Code 28 for reasons other than an avoidance scheme. At its highest, the knowledge that Hillyer McKeown was an indicative agent would, taken together with the use of Code 28 relief, have prompted the hypothetical officer to open an enquiry. But, as the UT said at (5) of their summary, with reference to *Langham v Veltema* at [33] and *Sanderson* at [35], that is insufficient, because "the information…must be more than would prompt the hypothetical officer to raise an enquiry". The relevant passage from Auld LJ's judgment in *Langham v Veltema* reads (emphasis added):.

> "More particularly, it is plain from the wording of the statutory test in section 29(5) that it is concerned, not with what an Inspector could reasonably have been expected to do, but with what he could have been reasonably expected to be aware of. It speaks of an Inspector's objective awareness, from the information made available to him by the taxpayer, of 'the situation'

> mentioned in section 29(1), namely an actual insufficiency in the assessment, not an objective awareness that he should do something to check whether there is such an insufficiency…"

## Decision on the discovery issue

65. For the reasons set out above, I find that the discovery assessment was validly made. I move on to consider the substantive issues.

### FINDINGS OF FACT ABOUT THE SUBSTANTIVE ISSUES

66. At some date before 12 October 2012, the Appellants made an offer to purchase the Property from the Vendors.

## The letter from Cornerstone

67. On 12 October 2012, the Appellants received a letter from Cornerstone, headed "SDLT Planning". It opened by saying "I understand you wish us to assist in mitigating the SDLT on your proposed purchase". The next part is headed "Overview of planning" and reads:

> "The tax mitigation planning called 'Serenity 2' may best be described as follows:
>
> (1) an intending purchaser of Property ('P') ('You') enters into a contract to purchase from a vendor ('V').
>
> (2) P then enters into a sub sale, with Property Futures Limited, to be executed simultaneous [sic] with completion of the first purchase paid full, enabling it to complete the purchase for the property for its full open market value in at least 25 years time
>
> The net effect is that no SDLT is payable by P on its purchase from V, there is little or no SDLT payable by Property Futures Limited."

68. The next following part is headed "Post-planning exits", and begins:

> "The Sub Sale contract provides that it can only be completed after 25 years have elapsed and certain conditions are met, and that P will receive full value based on the open market value at that time.
>
> The Bond is freely assignable and may be offered to any future purchaser of the Property. It may also be bought back by P."

69. Under the heading "technical and risk analysis", Cornerstone acknowledged that "HMRC may seek to litigate" and that:

> "there is a possibility, albeit a low one that they may be able to challenge successfully the strategy using the principles developed in the tax avoidance case of *IRC v Ramsay*. Whilst this is a remote possibility, I am duty bound to draw it to your attention".

70. The next paragraph reads:

> "The realistic downside risk for yourself is that you would become liable for the SDLT that would have become due, plus a small amount of interest at the official rate calculated from the date the tax should have been paid to the date it actually was paid, subject to any claim under the available insurance policy. In our view the probability of penalties being applied is very low."

**The PFL documents**

71. On 16 October 2012, PFL's directors met in Guernsey. The minutes record that:

(1) PFL had previously offered to purchase a freehold interest in the Property for £590,850, and that offer had been accepted;

(2) PFL had approved the terms of a draft sale agreement between itself and the Appellants in respect of the Property for that sum;

(3) PFL had resolved to issue a draft perpetual bond instrument in connection with that sale agreement, with the same nominal value ("the Bond"); and

(4) a certificate for £590,850 "in satisfaction of the consideration payable" under the draft sale agreement had been approved and would be issued.

72. PFL subsequently issued a certificate to the Appellants ("the Certificate"). The Certificate stated that the Appellants are the "registered holders of this unsecured bond of £590,850 subject to the Terms and Conditions of the Bond Issue". The Certificate is dated 23 October 2012.

73. Those Terms and Conditions ("the T&C") include the following provisions:

(1) The Bond is an unsecured, subordinated obligation of PFL; all bonds issued under the same T&C rank *pari passu* without any preference among themselves.

(2) The rate of interest payable on the Bond is 0.25% pa. increasing annually in line with the Retail Price Index in arrears.

(3) PFL has no obligation to pay interest on the Bond, and any failure to pay "shall not constitute a default" by PFL "for any purpose" including the Appellants' right to enforce the Bond, providing PFL informs the Appellants that it has decided not to pay the interest within 14 days following the interest payment date.

(4) The Bond has no maturity date.

(5) It can only be redeemed or repaid if either:

(a) PFL would be required to pay extra sums to the Appellants because of a change in UK tax legislation; or

(b) PFL gives notice of redemption to the Appellants; any such notice is irrevocable.

(6) PFL will only have defaulted on the Bond if "payment had become due", and no payment will become due if PFL "is not, or would not in making such a payment, be solvent". Additionally, as stated above, failing to pay the interest is not a "default" as long as PFL has given the Appellants the required 14 days' notice.

**The contract between the Appellants and the Vendors**

74. On 19 October 2012, the Vendors and the Appellants exchanged contracts. They signed a standard form document headed "Contract", which incorporated the Law Society's Standard Conditions of Sale. It included the name of the buyer and the seller, the name of the Property and stated that the purchasers were buying the Property with "Full Title Guarantee subject to all matters contained in or referred to in this agreement". The deposit was £32,000 out of the

total purchase price of £585,000. The completion date was stated to be 23 October 2012, and this was agreed to be the date on which completion in fact took place.

**The contract between the Appellants and PFL ("the Contract ")**

75. On the same date, 23 October 2012, the Appellants entered into a contract with PFL. The Bundle contained two copies, one signed by PFL and one by the Appellants. These are identical, other than that the "Effective date" is defined in the Appellants' copy as 23 October 2037, but in the PFL copy as "[space] 2037" – in other words, no day or month has been inserted.

76. Clause 3 provides that Clauses 1-7 come into force on 23 October 2012 and that Clauses 8 to 17 come into force on the Effective Date. The Clauses which came into force on 23 October 2012 included:

(1) Clause 1, which defined the terms used in the Contract;

(2) Clause 2, headed "non-assignment", which provided that:

(a) the Contract was personal to PFL,

(b) PFL cannot "assign, share, or part with the benefit of" any part of the Contract "without the express written consent" of the Appellants; and

(c) cannot register any form of notice or restriction against the Appellants'' title to the Property.

(3) Clause 4, which provided that PFL will pay the Appellants "the Initial Payment by a Perpetual Bond" issued by PFL. The term "Initial Payment" is defined by Clause 1 to be "the issue of Bonds to the value of the sum set out in Clause 9.1a in accordance with the Terms and Conditions set out in the Schedule to this Contract". Although that Schedule was not in the Bundle, the parties accepted that the terms which applied to the Bond were those separately exhibited, and summarised at §73.

(4) Clause 5 placed the obligation to insure the Property on the Appellants.

(5) Clause 6 is headed "Termination" and provides that the Contract terminates on "the first to occur of any of the following events":

(a) the Appellants failing to pay the mortgage on the Property;

(b) the Property ceasing to exist;

(c) the market value of the Property in the month preceding the Effective Date being less than the sum specified in Cause 9.1(a) of the Contract; or

(d) the Appellants giving PFL two months' notice of termination.

(6) Clause 7 is headed "Termination for breach", and provided that the Contract will terminate in circumstances which include:

(a) any sum payable under the Contract remaining unpaid for 10 working days;

(b) PFL otherwise breaching the terms and conditions of the Bond; or

(c) PFL being struck off from the Register of Companies or otherwise ceasing to exist.

77. The Clauses which are stated by Clause 3 to come into effect only on the Effective Date include Clauses 8 and 9. Clause 8 is headed "Sale and Purchase" and subclause 8.1 reads:

> "The Seller will sell and the Buyer will buy the Property for the Purchase Price on the terms of this contract."

78. Clause 9 is headed "Calculation of the Purchase Price", and subclause 9.1 reads:

> "The Purchase Price of the Property will be the higher of:
>
> (a) the sum of £590,850; and
>
> (b) the Market Value of the Property if sold as a whole on the Effective Date."

79. Subclause 9.2 defined the term Market Value, as being the same as in Valuation Standard 3.2 in the Royal Institution of Chartered Surveyors' Valuation Standards. Subclause 9.3 stated that the Market Value "may be agreed in writing at any time between the Seller and the Buyer" but if not so agreed within ten days, will be determined by an Independent Valuer. Subclauses 9.4 to 9.10 dealt with the appointment, role and decision of an Independent Valuer.

80. Clauses 13, 14 and 20 also come into effect only on the Effective Date. Clause 13 provided that "the Property will be sold with vacant possession on completion" and Clause 14 that "the Seller will transfer the Property with full title guarantee". Clause 17 states that "Completion will take place on the day that is 20 Working Days after the date on which the Purchase Price is agreed or determined in accordance with Clause 9".

**The retrospective legislation and the Rider**

81. Finance Act 2013, s 194 introduced anti-avoidance legislation with retrospective effect in relation to certain transfers of rights entered into on or after 21 March 2012. I return to that legislation later in this Decision, see §140ff. The Act received Royal Assent on 17 July 2013.

82. On 19 July 2013, Cornerstone wrote to the Appellants, informing them about the retrospective provisions, but saying that:

> "…during the debates and in the issue of the guidance notes on the new section, there is nothing to suggest that the planning you have entered into was the target of the new legislation."

83. The letter continued:

> "however, in order to put matters into clear focus and to render the arguments that the legislation should not apply [some text appears to have been omitted here] we request that you enter into the attached riders to your existing Serenity 2 Contract. This will have the effect of putting it beyond doubt that you are not in possession of the property and that the completion date in the Contract can be moved up (agreed to be exercised earlier) by the parties. The legal effect of this is to put the planning you have used quite clearly beyond the ambit of the section, its explanatory notes, and the related Parliamentary debates on it.
>
> We ask that you sign the attached Contract Rider, sending one copy to your solicitor, and one to PFL's solicitor, to be appended to the Contract documents held by each."

84. On 1 August 2013, the Appellants signed a document headed "Rider to contract dated 23 October 2012". The document first referred to the address of the Property, and then said:

> "For the avoidance of doubt and in order to clarify the contents of Contract [sic] dated 23 October 2012 both the Seller and the Buyer agree as follows:
>
> - The Completion Date as defined therein may be brought forward by mutual agreement between the Seller and the Buyer.
> - All the consideration under the contract is by the issue of perpetual bonds in accordance with Clause 9 and the bonds were sent to the Seller's solicitors from the Buyer's solicitors on exchange.
> - For the duration of the contract the Seller will hold the property in his capacity as trustee for the benefit of the Buyer."

### The Appellants and the Property

85. The Land Registry was updated on 11 November 2012; its records show that the Appellants have (and continue to have) "Title Absolute" over the Property.

86. The Appellants were living in the Property at the time HMRC made the decision which is under appeal, and were still in occupation as at the date of this hearing.

87. The Land Registry records show that on 10 November 2014 a company called "Platform Funding Ltd" registered a charge over the Property. It was not in dispute that the Appellants had a mortgage with that company as at that date.

88. I find that the Appellants also had a mortgage on the Property from 23 October 2012, the date they completed on the contract with the Vendors, until 10 November 2014, when they took out the Platform Funding mortgage, because:

(1) on 15 October 2012, the Appellants received a mortgage offer from ING Direct of £468,000, being 80% of the £585,000 payable by the Appellants to the Vendors;

(2) that offer indicates that the Appellants were seeking a mortgage of that amount in order to purchase the Property;

(3) the ING mortgage offer included a "tracker" interest rate which would expire after two years;

(4) the Platform Funding mortgage was taken out almost exactly two years later; and

(5) although the Tribunal did not have direct evidence as to whether or not the mortgage taken out by the Appellants was with ING, on the balance of probabilities I find that this was the case.

89. The copy of the Land Registry title in the Bundle was printed out on 27 July 2015. That title does not record any person having an interest in, or charge over, the Property other than the mortgagee, Platform Funding Ltd. There was no connection between that company and PFL.

## THE SECOND ISSUE: THE CONTRACT AND THE EFFECT OF THE RIDER

### Mr Hickey's submissions

90. Mr Hickey relied on the "basic principles to be applied to the construction of written contracts" set out in *Ingenious v HMRC* [2019] UKUT 0226 (TCC). *Ingenious* involved a

complex structure constituted by a suite of agreements, each of which was entered into at the same time. The FTT had found that those agreements formed a single "composite agreement". The taxpayers challenged that approach when they appealed to the UT.

91. At [79] of its judgment, the UT set out extracts from *Wood v Capita* [2017] AC 1173, which summarise the basic principles applicable when construing contracts. Lord Neuberger said at [10] that "the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement" and at [11] that the court must consider "the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense".

92. At [80] the UT cited Lord Neuberger in *Arnold v Britton* [2015] AC 1619 at [15]:

> "when interpreting a written contract, the court is concerned to 'identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean' (citing Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Limited* [2009] AC 1101 at [14]) by focusing on the meaning of the relevant words in the documentary, factual and commercial context."

93. At [108] the UT considered the approach taken by the FTT, and said:

> "We are therefore not persuaded that, as a matter of contractual construction, the FTT was correct in adopting a 'composite agreement' approach without reference to *Ramsay*. In our view, the starting position for the FTT in construing the contracts should have been to consider them separately in accordance with the basic principles set out at [79] and [80] above. However, where a number of contracts are entered into together, at the very least the existence of the other contracts is part of the factual background known to the parties at or before the date of the contract, as referred to by Lord Neuberger at [10] of *Wood v Capita* (quoted at [79] above) and commonly referred to as the 'factual matrix'. The existence of the other contracts is therefore a relevant part of the factual matrix when construing any one of them. Furthermore, where the contracts specifically cross-refer or there are other indications that they are intended to operate only as a package, then that fact will be relevant."

94. At [109] the UT referred to the following passage from Lewison on the Interpretation of Contracts, 6th edition, paragraph 3.03; Mr Hickey placed particular emphasis on the words I have emboldened.

> "Many transactions take place by the entry into a series of contracts…. In such cases, where the transaction is in truth one transaction all the contracts may be read together for the purpose of determining their legal effect. This principle is a more specific example of the general principle that background is admissible in interpreting a written contract. **It applies to other documents executed as part of the same transaction, whether they happen to be executed** before, at the same time as, or **after the document requiring to be interpreted."**

95. At [110] the UT summarised the position by saying that "where there is in truth one transaction, the tribunal is entitled to read the contracts together for the purpose of determining their legal effect".

96. Mr Hickey submitted that as the Rider was stated to be "clarificatory", it should therefore be read together with the Contract as a single document. With reference to *Ingenious* and the case law there cited, he said that the "wider context" was that the Appellants were engaged in SDLT planning, and had voluntarily agreed to sign the Rider in order to "put the planning… quite clearly beyond the ambit" of the retrospective provisions introduced by FA 2013, see Cornerstone's letter of 19 July 2013.

97. The first bullet point of the Rider stated that the Contract's completion date could be earlier than 2037. That this had happened was clear from the second and third bullet points of, which said that "all the consideration under the contract is by the issue of perpetual bonds" and that for the duration of the Contract the Appellants will hold the Property in their capacity as trustees for the benefit of PFL.

98. As a result, reading the Contract and the Rider together, the entire beneficial interest in the Property had passed to PFL on 23 October 2012 in exchange for the Bond; from that date, the Appellants were simply holding the property as bare trustees for PFL. Mr Hickey relied on *Gray & Gray: Elements of Land Law* at 8.1.60, which states (his emphasis):

> "on exchange of contracts the vendor first becomes a constructive trustee of his legal estate holding on a trust which arises by construction of the court. But, as soon as the purchase money is received in full, he is converted (until the date of completion of the transfer) into a bare trustee for his purchaser, and the purchaser acquires an irresistible right to call for the transfer of the promised estate."

99. In answer to questions from the Tribunal, Mr Hickey accepted that, were he to be correct, parts of the Contract fell away and/or become unenforceable. For example:

(1) there was no "Effective Date", because the Property had passed in its entirety to PFL on 23 October 2012, when the Contract was agreed;

(2) although Clause 4 of the Contract described the Bond as the "initial payment", it was in fact the only payment;

(3) certain rights and obligations (such as the Appellants' obligation to insure the Property until the Effective Date under Clause 5) were now unenforceable; and

(4) Clause 6, which allowed the Appellants to terminate the Contract on serving two months' notice on PFL, had fallen away.

100. Mr Hickey also submitted that because the Appellants had signed the Rider, they were estopped from arguing that they remained beneficial owners of the Property. He relied on *Blindley Heath v Bass* [2017] EWCA 1023, which decided that estoppel applied even if the parties had "misappreciated, misremembered or forgotten the true state of things". It was therefore irrelevant, he said, that the Appellants themselves may not have appreciated the effect of the Rider.

101. He asked me to find that the Cornerstone letter of 19 July 2013 was part of the relevant factual background. That letter informs the Appellants that signing the Rider "will have the

effect of putting it beyond doubt that you are not in possession of the property" (his emphasis). He said that, having considered that letter, the reasonable person would agree that his analysis of the way the Contract and the Rider operated was correct.

102. In summary, he submitted that the effect of reading the Contract and the Rider together was that:

(1) the Appellants had sold the Property on 23 October 2012 in exchange for the Bond;

(2) PFL now had "an irresistible right to call for the transfer of the promised estate";

(3) the Appellants were estopped from preventing PFL taking the Property; and

(4) this was the position even if the Appellants had "misappreciated" the effect of the Rider.

**Miss Wilson's submissions**

103. Miss Wilson submitted that Mr Hickey's analysis was entirely wrong. She said that in 2012 the parties had entered into a comprehensive contract which:

(1) contained Clauses giving PFL the right to purchase the Property for the higher of the market price, and the £590,850 value of the Bond, but those Clauses only came into force on the Effective Date in 2037 (Clauses 1, 3 and 8);

(2) at any prior point, the Appellants had the right to terminate the Contract with two months notice (Clause 6); and

(3) in the meantime, PFL had provided the Appellants with an unsecured bond which the Appellants were unable to redeem for cash and on which no interest was payable as long as PFL had given prior notice (Clause 4 and the T&C). Miss Wilson described the Bond as "a worthless piece of paper".

104. The Rider was expressly stated to be "clarificatory". But if Mr Hickey were correct, the Rider is to be read with the Contract so that:

(1) the Appellants sold the entire beneficial interest in their property to a BVI company in exchange for a worthless piece of paper; and

(2) significant parts of the Contract are now of no effect.

105. Miss Wilson said there was no basis on which the two documents could be read together in the way suggested by Mr Hickey. Instead, the Contract came into existence on 23 October 2012; and later, after the change in the law, Cornerstone asked the parties to sign the Rider. The context of the Rider is Cornerstone's letter of 19 July 2013. That does not say that, by signing the Rider, the Appellants were entering into a new arrangement under which they were giving their Property away to PFL in exchange for the Bond. There is no reference in the Rider to removing the Appellants' right to withdraw from the Contract on giving two month's notice.

106. In Miss Wilson's submission, the Contract fell to be construed on its own terms, as did the Rider. The effect of each bullet point of the Rider was as follows (the bullet points have been italicised):

(1) *The Completion Date as defined therein may be brought forward by mutual agreement between the Seller and the Buyer*. Miss Wilson agreed this was clarificatory, but said that it changed nothing of relevance to this appeal because:

(a) it is always possible for parties to a contract to vary it, so that a date for a future action is brought forwards;

(b) the bullet point did not vary the Contract by bringing forward the completion date; instead, it simply recorded that this could happen.

(2) *All the consideration under the contract is by the issue of perpetual bonds in accordance with Clause 9 and the bonds were sent to the Seller's solicitors from the Buyer's solicitors on exchanges*. In Miss Wilson's submission, this sentence "doesn't make much sense". It could not be a waiver of Clause 9, the purchase price clause in the Contract, because that would be a variation. To be effective, a variation must either be made by deed, or requires consideration. The Rider is not a deed, and PFL did not give any consideration to the Appellants for signing the Rider. Miss Wilson suggested that the bullet point might provide confirmation that the Bond had been issued and delivered to the Appellants.

(3) *For the duration of the contract the Seller will hold the property in his capacity as trustee for the benefit of the Buyer.* She said that since the Rider is not a deed of trust, the only way of construing this sentence is as a description of what is already believed to exist, namely that until 2037 the Appellants are holding the Property as trustees for PFL. She referred to *Ingenious* at [146] where the UT referred to the vendor of a property as assuming "certain trustee-like duties" in respect of the property which he had contracted to sell. That passage reads::

> "a person who has contracted to sell real estate (or other unique property) is under an obligation to use reasonable care to preserve the property until completion. That the vendor assumes certain trustee-like duties in respect of the property does not, however, mean that he or she immediately relinquishes all beneficial interest in it upon conclusion of the contract of sale. Subject to the terms of the contract, the vendor will, for example, remain entitled to the enjoyment of the land or its rental income until the contractual completion date has been reached, and the purchase price paid in full. So, in *Jerome v Kelly (Inspector of Taxes)* [2004] STC 887, Lord Walker said at [32] that it would be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust of a beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership".

**The Tribunal's view**

107. I first consider whether Mr Hickey is right that *Ingenious* provides support for his submission that the Contract and the Rider are to be construed together in the way he suggests. For the reasons explained below, I reject his submissions. I then move on to construe the Rider, and in doing so rely on the principles set out in *Ingenious* and the case law there cited.

***Reliance on Ingenious***

108. In *Ingenious* the taxpayer LLPs had entered into a complex structure constituted by a suite of agreements, all of which were entered into at the same time in relation to each film. At [108], the UT said that (my emphasis) "where a number of contracts <u>are entered into together</u>, at the very least the existence of the other contracts is part of the factual background known to the parties at or before the date of the contract". The passage from Lewison, on which Mr Hickey placed particular reliance, begins by saying (again, my emphasis):

> "Many transactions take place by the entry into a series of contracts…. In such cases, where the transaction is in truth one transaction all the contracts may be read together for the purpose of determining their legal effect."

109. Where that is the position, it does not matter, as stated in Lewison, whether the documents are executed at the same time or not. The key issue is whether there is "in truth one transaction"; if there is, the tribunal is entitled to read the contracts together for the purpose of determining their legal effect.

110. That is not the position here. The Contract was signed on 23 October 2012. The Rider came into existence on 28 August 2013. The Contract and the Rider were not "one transaction". Instead, the Contract was followed ten months later by an entirely separate document which was not in prospect at the time of the Contract, but came into being as the result of the change in SDLT law.

***The Rider does not change the Contract***

111. Even if Mr Hickey were to be correct that there was a single transaction, I agree with Miss Wilson that the Rider does not change the Contract, and in particular, it does not bring about the fundamental changes contended for by Mr Hickey.

112. As the Rider is a rider to the Contract, the Tribunal must follow the "basic principles to be applied to the construction of written contracts", see in particular the citations from *Wood v Capita* and *Chartbrook v Persimmon* at §91 and §92. Those principles require me to "identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties" to mean, by "focusing on the meaning of the relevant words in the documentary, factual and commercial context". Where there are rival constructions, the Tribunal must reach a view as to which is "more consistent with business common sense", in order to find "the objective meaning of the language which the parties have chosen to express their agreement".

113. I therefore next (a) set out the relevant background knowledge; (b) establish the purpose of the Rider and (c) construe the Rider.

*The background knowledge*

114. The background knowledge includes the following facts:

(1) The Appellants had moved into the Property on or soon after 23 October 2012. They had taken out a mortgage on the Property. They were still living in the Property at the time HMRC made the decision which is under appeal, and remain there at the date of this hearing.

(2) The Cornerstone letter of 12 October 2012 told the Appellants that the Contract "can only be completed after 25 years have elapsed and certain conditions are met, and that [the Appellants] will receive full value based on the open market value at that time".

(3) The T&C stated that:

(a) the Bond had no maturity date;

(b) was not secured by assets to the value of £590,850 or at all;

(c) could not be redeemed at the Appellants' option but only at PFL's option;

(d) earned only a very low rate of interest (0.25% pa); and

(e) the failure to pay that interest did not amount to a default, as long as PFL had informed the Appellants of that deferral within 14 days of the interest payment date.

(4) The Cornerstone letter of 19 July 2013 said that the purpose of the Rider was to "put matters into clear focus and to render the arguments that the legislation should not apply [missing text]" and "to put the planning you have used quite clearly beyond the ambit of the [new anti-avoidance] section".

(5) The same letter also said that signing the Rider "will have the effect of putting it beyond doubt that you are not in possession of the property".

*The purpose of the Rider*

115. The Rider therefore begins by stating that has been entered into "for the avoidance of doubt and in order to clarify the contents of Contract". This is consistent with the parts of Cornerstone's July 2013 letter which refer to putting "matters into clear focus" and placing the SDLT planning clearly beyond the ambit of the [new anti-avoidance] section". The reasonable person with that relevant background knowledge would have understood that the purpose of the Rider was to clarify the position.

116. What would that person have made of the statement in the same letter that the Rider had "the effect of putting it beyond doubt that you are not in possession of the property"? Would he have found that there had been a change to the nature of the agreement, so that PFL had become the owner of the Property with effect from October 2012? The answer is clearly no, because:

(1) the sentence reads (emphasis added) "will have the effect <u>of putting it beyond doubt that</u> you are not in possession of the property". The reasonable person would know that the purpose was therefore not to create a fundamentally new agreement between the parties, but to reinforce the existing position;

(2) that person would know that the Appellants <u>were</u> in possession of the Property, and would find that the statement to the contrary, namely that they were "not in possession of the property", makes no sense

(3) the suggestion that the Appellants would have agreed to part with the Property, which was worth around £585,000, in exchange for this unsecured Bond with no maturity date which they were unable to redeem, simply in order to avoid SDLT of £23,400, is entirely inconsistent with business common sense.

117. I therefore find that the reasonable person, taking into account the background facts and the heading to the Rider itself, would find that its purpose was to clarify the Contract in the context of the Appellants' existing SDLT planning.

*Construing the bullet points in the Rider*

118. Taking into account both the factual matrix and the text of the Rider itself, I find that the objective meaning of the bullet points to be as follows:

(1) the first bullet point is that *the Completion Date as defined therein may be brought forward by mutual agreement between the Seller and the Buyer*.

(a) As Miss Wilson says, the plain meaning is that the completion date "may" be brought forward; the Rider does not change the date.

(b) Clause 3 (commencement) has therefore not been varied and neither has the definition of the Effective Date in Clause 1. As a result the bullet point does not bring forward the date on which Clauses 8-17 come into force. It is these Clauses which cover the sale to PFL, the purchase price, and the completion date, and they come into force in 2037.

(2) the second bullet point is that *all the consideration under the contract is by the issue of perpetual bonds in accordance with Clause 9 and the bonds were sent to the Seller's solicitors from the Buyer's solicitors on exchanges*". The final part of this sentence is non-contentious and simply records delivery of the Bond. In relation to the first part, I find as follows:

(a) Clause 9 is silent on how consideration is to be provided (for instance, whether by cash, by bonds, or otherwise). Instead it provides that the price is the higher of the Bond value and market value. The Rider is therefore wrong to state that "all consideration is by the issue of perpetual bonds in accordance with Clause 9".

(b) I considered whether, instead of being wrong, the Rider had changed Clause 9 so it provides that "all consideration is by the issue of perpetual bonds", or, in other words, that "the full consideration for the Property was the Bond issued in October 2012". But that change to the wording of Clause 9 would be a fundamental variation to the Contract, and as Miss Wilson said, absent a deed, a variation is effective only if there is consideration. The Rider is not a deed, and there was no consideration.

(c) Such a change to Clause 9 would also be inconsistent with the background facts: no reasonable person would find that by signing the Rider the Appellants had agreed to give away the Property in exchange for the Bond, an unsecured debt instrument with no maturity date, which the holder could not redeem for cash, and which paid no interest as long as PFL had given prior notice.

(3) The third bullet reads: *for the duration of the contract the Seller will hold the property in his capacity as trustee for the benefit of the Buyer.*

(a) I agree with Miss Wilson that as the Rider is not a deed of trust, the only way of construing this sentence is as a description of what is already believed to exist, namely that until 2037 there is a "trustee-like" relationship between the Appellants and PFL.

(b) This does not mean that the Appellants have given up their entire beneficial interest in the Property so as to become bare trustees for PFL. Miss Wilson referred to the UT's summary of *Jerome v Kelly* at [146] of *Ingenious.* At [32] of the judgment in that case, Lord Walker said (my emphasis):

> "It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and

> that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, such as rescission of the contract (either under a contractual term or on breach). If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full."

(c) There is thus a provisional assumption that in 2037 PFL will purchase the Property in accordance with Clause 9. But that may never come to pass. Until 2037, all that has happened is that PFL have given the Appellants the Bond, and the Appellants have given PFL rights which will come into effect in 25 years' time, but only if the Contract has not been terminated before that date, for instance by the Appellants giving PFL notice of withdrawal under Clause 6. The current position is that the Appellants have not given up their entire beneficial interest in the Property so as to become bare trustees for PFL.

(d) I also find that no reasonable person with knowledge of the background facts would read the third bullet point as establishing a new trust, or as changing of the terms of an existing trust in favour of PFL, because the Appellants would not, by signing the Rider, have agreed to give away the Property in exchange for the Bond.

### Conclusion on the Contract and the effect of the Rider

119. For the reasons set out above, the Rider does not change the Contract. The Appellants' liability (or otherwise) to pay SDLT therefore depends only on the Contract, not on the Contract and the Rider taken together.

## THE THIRD ISSUE: WHETHER SUBSALE RELIEF APPLIES

120. As set out at the beginning of this Decision, Mr Hickey submitted that no SDLT was payable by the Appellants because the scheme fell within the sub-sale relief in s 45(3).

121. HMRC's position was that the scheme did not satisfy the basic requirements for that relief, but if that was wrong, the scheme was caught by both s 45(3A) and s 75A. In this part of the Decision, I consider whether the requirements of s 45(3) are met. Having done so, I go on to consider s 45(3) and s 75A.

### The legislation

122. SDLT is a tax on land transactions (s 42(1)). A "land transaction" is "any acquisition of a chargeable interest" (s 43(1)), and a "chargeable interest" is defined in s 48(1) as including "an estate, interest, right or power in or over land in the United Kingdom" other than an exempt interest.

123. Section 44 is headed "Contract and conveyance" and reads:

> "(1) This section applies where a contract for a land transaction is entered into under which the transaction is to be completed by a conveyance.
>
> (2) A person is not regarded as entering into a land transaction by reason of entering into the contract, but the following provisions have effect.

(3) If the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction.

In this case the effective date of the transaction is the date of completion.

(4) If the contract is substantially performed without having been completed, the contract is treated as if it were itself the transaction provided for in the contract.

In this case the effective date of the transaction is when the contract is substantially performed.

(5) A contract is "substantially performed" when—

(a) the purchaser, or a person connected with the purchaser, takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or

(b) a substantial amount of the consideration is paid or provided

(6) For the purposes of subsection (5)(a)—

(a) possession includes receipt of rents and profits or the right to receive them, and

(b) it is immaterial whether [possession is taken]1 under the contract or under a licence or lease of a temporary character.

(7) For the purposes of subsection (5)(*b*) a substantial amount of the consideration is paid or provided—

(a) if none of the consideration is rent, where the whole or substantially the whole of the consideration is paid or provided;

(b)-(c)….

(8) Where subsection (4) applies and the contract is subsequently completed by a conveyance—

(a) both the contract and the transaction effected on completion are notifiable transactions, and

(b) tax is chargeable on the latter transaction to the extent (if any) that the amount of tax chargeable on it is greater than the amount of tax chargeable on the contract.

(9) …

(10) In this section—

(a) references to completion are to completion of the land transaction proposed, between the same parties, in substantial conformity with the contract; and

(b) "contract" includes any agreement and "conveyance" includes any instrument."

124. In *Project Blue v HMRC* [2018] UKSC 30 ("*Project Blue*") Lord Hodge, giving the only judgment with which the rest of the Court agreed, summarised the effect of s 44 at [11]:

"When persons enter into a contract for a land transaction under which the transaction is to be completed by a conveyance, section 44(2) provides that

they are not regarded as entering into a land transaction by reason of entering into the contract…Instead, if the transaction is completed without previously having been substantially performed, the contract and the transaction effected on completion are treated as parts of a single land transaction, whose effective date is the date of completion (section 44(3)). If the contract is not completed but is substantially performed (for example, if the purchaser takes possession of the subject matter of the contract or a substantial amount of the consideration is paid) the contract is treated as if it were the transaction provided for in the contract and its effective date is when the contract is substantially performed (section 44(4) and (5)).”

125. Section 45 reads as follows, excluding for this purpose subclauses (3A) and (3B),:

**“45 Contract and conveyance: effect of transfer of rights**

(1) This section applies where

(a) a contract for a land transaction (‘the original contract’) is entered into under which the transaction is to be completed by a conveyance,

(b) there is an assignment, subsale or other transaction (relating to the whole or part of the subject-matter of the original contract) as a result of which a person other than the original purchaser becomes entitled to call for a conveyance to him, and

(c) paragraph 12B of Schedule 17A (assignment of agreement for lease) does not apply.

References in the following provisions of this section to a transfer of rights are to any such assignment, subsale or other transaction, and references to the transferor and the transferee shall be read accordingly.

(2) The transferee is not regarded as entering into a land transaction by reason of the transfer of rights, but section 44 (contract and conveyance) has effect in accordance with the following provisions of this section.

(3) That section applies as if there were a contract for a land transaction (a secondary contract’) under which

(a) the transferee is the purchaser, and

(b) the consideration for the transaction is

(i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and

(ii) the consideration given for the transfer of rights.

The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded except….”

126. The effect of s 45 (as unamended by Finance Act 2013) is that when the original purchaser on-sells to second purchaser under a “secondary contract” without the first contract having been either completed or “substantially performed”, the original purchaser does not have to pay SDLT; in other words, he is entitled to subsale relief.

127. For subsale relief to apply to this transaction, the following must therefore be present:

(1) there must be an "original contract" under which the transaction is to be completed by a conveyance (s 45(1(a)), and that contract must have been substantially performed or completed (s 45(3));

(2) there must be a "secondary contract", as a result of which PFL became entitled to call for a conveyance to it (s 45(1(b) and (3));

(3) that secondary contract must also have been substantially performed or completed (s 45(3)); and

(4) the substantial performance or completion of the original contract must occur "at the same time as, and in connection with" the substantial performance or completion of the secondary contract (s 45(3)).

128. I consider each of those in turn below.

**The original contract**

129. There was no dispute that the Appellants had entered into contract with the Vendors for a land transaction which was completed by a conveyance. There was thus an "original contract" as defined; the completion date was 12 October 2012.

**Whether there was a secondary contract**

130. For there to be a secondary contract, PFL must have been "entitled to call for a conveyance". Mr Hickey relied on the submissions which I have already considered and rejected, namely that the Rider was effective to change the Contract, with the result that, since 12 October 2012, the Appellants had been holding the Property as bare trustees for PFL, and thus PFL was entitled at any time to call for the Property to be conveyed to it.

131. Miss Wilson said that the Contract gave PFL no such entitlement, because:

(1) PFL's right to purchase the property is in Clause 8, but that right was not in force when the Contract was signed: by Clause 3 that right only came into force on the Effective Date, which was in 2037;

(2) as at the date of the Contract, Clause 2 provided that it was personal to PFL and that PFL's rights were significantly restricted: it could not assign or part with the benefit of the Contract without the Appellants' consent, or register any notice or restriction against the property; and

(3) that Clause was consistent with the Cornerstone letter sent to the Appellants before the transaction, which said that "The Sub Sale contract provides that it can only be completed after 25 years have elapsed and certain conditions are met".

132. I agree with Miss Wilson, for the reasons she gives, that there was no secondary contract. As a result, the scheme fails. However, in case I am wrong on this, I have gone on to consider the other reasons put forward by Miss Wilson as to why SDLT was due from the Appellants.

**Whether substantially performed or completed at the same time as the original contract**

133. The parties disagreed as to whether the Contract had been substantially performed or completed at the same time as the original contract. Mr Hickey said that PFL had provided the Bond to the Appellants on the same day as the original contract, and that the Bond was full consideration for the transfer of the Property to PFL.

134. Miss Wilson said that there had been neither substantial performance nor completion. Substantial performance was defined by s 44(5) as requiring that either:

> "(a) the purchaser, or a person connected with the purchaser, takes possession of the whole, or substantially the whole, of the subject-matter of the contract, or
>
> (b) a substantial amount of the consideration is paid or provided."

135. The Appellants were still in possession of the Property, so (a) was not satisfied. In relation to (b), nothing had been paid to the Appellants other than the Bond, which was, she said "an unsecured and unenforceable obligation to pay a mere 0.25% of £590,850 per annum on such dates (if at all) as PFL shall decide". Thus, a substantial amount of the consideration had neither been paid or provided.

136. In addition, there was no "completion", because Mr Hickey's submissions as to the effect of the Rider were to be rejected. As a result, completion would not take place until 2037, and then only if Appellants had not previously cancelled the Contract under Clause 6. That this is correct can also been seen from the fact that the Land Registry records the Appellants as the legal owners, and makes no reference whatsoever to PFL.

137. Again, I agree with Miss Wilson for the reasons she gives.

### Conclusion on s 45(3)

138. For the reasons set out above, I find that the Appellants are not entitled to sub-sale relief under s 45(3).

139. It is therefore unnecessary for me to consider s 45(3A) or s 75A, but as those points were fully argued, and in case this appeal goes further, I set out the parties' submissions and my conclusions in the next following paragraphs.

## THE FOURTH ISSUE: WHETHER THE SCHEME IS CAUGHT BY S 45(3A)

140. As already noted, Finance Act 2013 introduced retrospective legislation which had effect in relation to transfers of rights entered into on or after 21 March 2012.

### The legislation

141. Section 45(3), already set out above, was amended by the addition of the underlined phrase in the final line below, so that it read:

> "(3) That section [s 44] applies as if there were a contract for a land transaction (a secondary contract') under which
>
> (a) the transferee is the purchaser, and
>
> (b) the consideration for the transaction is
>
> (i) so much of the consideration under the original contract as is referable to the subject-matter of the transfer of rights and is to be given (directly or indirectly) by the transferee or a person connected with him, and
>
> (ii) the consideration given for the transfer of rights.

> The substantial performance or completion of the original contract at the same time as, and in connection with, the substantial performance or completion of the secondary contract shall be disregarded except in a case excluded by s 3A"

142. Sections (3A) to (3C) read as follows:

> "(3A) A case is excluded by this subsection from the second sentence of subsection (3) if
>
> (a) the secondary contract is substantially performed at the same time as, and in connection with, the substantial performance or completion of the original contract but is not completed at that time ('the relevant time'),
>
> (b) the original purchaser or a person connected with the original purchaser is in possession of the whole, or substantially the whole, of the subject-matter of the transfer of rights at any time after the relevant time, and
>
> (c) having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage for the original purchaser was the main purpose, or one of the main purposes, of the original purchaser in entering into the transfer of rights.
>
> (3B) In subsection (3A)
>
> 'possession' has the same meaning as in section 44(5)(a);
>
> 'tax advantage' means
>
> (a) a relief from tax or increased relief from tax,
>
> (b) a repayment of tax or increased repayment of tax, or
>
> (c) the avoidance or reduction of a charge to tax.
>
> (3C) Nothing in subsection (3A) or (3B) affects the breadth of the application of sections 75A to 75C."

143. Thus, in the context of this case, s 45(3A) applies if the following requirements are met:

(1) the secondary contract (between the Appellants and PFL) was substantially performed at the same time as the original contract (between the Appellants and the Vendors), but had not been completed at that time;

(2) the Appellants are in possession of the whole, or substantially the whole, of the Property at any time after the contract with the Vendors was completed; and

(3) the Appellants had a tax avoidance purpose in entering into these arrangements.

144. Although I have already found that the first condition was not satisfied, for the purposes of this part of the Decision, I have assumed that conclusion was incorrect. In relation to the third condition, Mr Hickey accepted that the Appellants had a tax avoidance purpose. The only remaining condition was whether the Appellants were "in possession" of the Property within the meaning of s 45(3A)(b).

**Whether the Appellants were "in possession" within the meaning of s 45(3A)(b)**

145. Mr Hickey said that, although the Appellants were physically in possession of the Property, they were occupying it only as bare trustees for PFL. He referred to Sch 16, para 1, which includes the following definitions:

> "(1) In this Part 'settlement' means a trust that is not a bare trust.

(2) In this Part a 'bare trust' means a trust under which property is held by a person as trustee

(a) for a person who is absolutely entitled as against the trustee, or who would be so entitled but for being a minor or other person under a disability, or

(b) for two or more persons who are or would be jointly so entitled,

and includes a case in which a person holds property as nominee for another.

(3) In sub-paragraph (2)(a) and (b) the references to a person being absolutely entitled to property as against the trustee are references to a case where the person has the exclusive right, subject only to satisfying any outstanding charge, lien or other right of the trustee, to resort to the property for payment of duty, taxes, costs or other outgoings or to direct how the property is to be dealt with."

146. Miss Wilson said that s 45(3B) provides that "possession" in s 45(3A) had the same meaning as in s 44(5)(a), and that meaning is set out at s 44(6) which reads:

"(a) possession includes receipt of rents and profits or the right to receive them, and

(b) it is immaterial whether possession is taken under the contract or under a licence or lease of a temporary character."

147. There was, she said, no statutory exclusion for occupation of the Property as a bare trustee, even if (which she did not accept) that was the Appellants' position.

148. My starting point is that the Appellants were in actual possession of the Property at a time after they completed their purchase from the Vendors. Section 44(6) makes it clear that the definition of possession is wide, including possession under licence. In *Street v Mountford* [1985] 2 WLR 877 Lord Templeman, giving the only judgment with which the other Law Lords agreed, approved the definition of a "licence" given by Windeyer J in *Radaich v. Smith* (1959) 101, CLR 209, 222 as "a personal permission to enter the land and use it for some stipulated purpose or purposes".

149. A person occupying a property as trustee of a bare trust is a nominee, acting under the instructions of the beneficiary. If the Appellants were in occupation on that basis, the position would be similar to occupation under licence: they would be in the Property only because PFL allowed them to be there. That type of occupation is not excluded by s 44(6). Instead that definitional subsection begins "possession includes…".

### Conclusion on s 45(3A)

150. Thus, even if the Appellants would have been entitled to sub-sale relief prior to the introduction of the retrospective amendment, they are blocked by s 45(3A) because they are in possession of the Property within the meaning of that section.

#### THE FIFTH ISSUE: WHETHER THE SCHEME IS CAUGHT BY S 75A

151. Mr Hickey submitted that s 75A did not apply, but Miss Wilson relied on it as a fall-back if, contrary to her other submissions, the Appellants had not fallen at the earlier hurdles of s 45(3) and (3A).

**The legislation**

152. The section is headed "anti-avoidance" and provides as follow:

> (1) This section applies where—
>
> (a) one person (V) disposes of a chargeable interest and another person (P) acquires either it or a chargeable interest deriving from it,
>
> (b) a number of transactions (including the disposal and acquisition) are involved in connection with the disposal and acquisition ("the scheme transactions"), and
>
> (c) the sum of the amounts of stamp duty land tax payable in respect of the scheme transactions is less than the amount that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V.
>
> (2)-(3)…
>
> (4) Where this section applies—
>
> (a) any of the scheme transactions which is a land transaction shall be disregarded for the purposes of this Part, but
>
> (b) there shall be a notional land transaction for the purposes of this Part effecting the acquisition of V's chargeable interest by P on its disposal by V.
>
> (5) The chargeable consideration on the notional transaction mentioned in subsections (1)(c) and (4)(b) is the largest amount (or aggregate amount)—
>
> (a) given by or on behalf of any one person by way of consideration for the scheme transactions, or
>
> (b) received by or on behalf of V…by way of consideration for the scheme transactions.
>
> (6) The effective date of the notional transaction is—
>
> (a) the last date of completion for the scheme transactions, or
>
> (b) if earlier, the last date on which a contract in respect of the scheme transactions is substantially performed."

**The parties' submissions**

153. There was no dispute that s 75(1)(a) and (b) were satisfied. The issue was whether subsection 1(c) applied so that the Appellants were liable for SDLT. That subsection requires a comparison between:

(1) the SDLT payable on the scheme transactions; and

(2) the "amount of SDLT that would be payable on a notional land transaction effecting the acquisition of V's chargeable interest by P on its disposal by V".

154. As Lord Hodge observed in *Project Blue* at [43], s 75A "does not identify who is V and who is P in relation to the transactions to which the section applies". The parties agreed that "V" was the Vendors, but disagreed as to the identity of "P".

155. Mr Hickey submitted that P was PFL, so that s 75A required a comparison between:

(1) the SDLT payable on the scheme transactions involving the Vendors, the Appellants and PFL. On the assumption that the Appellants were entitled to subsale relief under s 45(3), and were not blocked by s 45(3A), the SDLT was nil; and

(2) the SDLT which would have been payable had the Vendors sold the Property to PFL directly, in exchange for the Bond. The SDLT was to be calculated as follows:

(a) the consideration which would have been given by PFL to the Vendors was the Bond;

(b) the Bond was an annuity, because payments were to be made periodically and in perpetuity;

(c) where consideration is paid by an annuity, s 52(2) requires that the value to be taken into account for SDLT purposes be "limited to twelve year's annual payments"; and thus

(d) the consideration was the interest payable on the Bond for twelve years at 0.25% per annum, or £17,725.5 (£590,850 x 0.25% x 12); and

(e) this was below the SDLT threshold of £125,000, see s 55.

156. Mr Hickey said that both parts of the comparison therefore give a nil answer. As a result, no SDLT was payable under s 75A.

157. Miss Wilson said that Mr Hickey had misunderstood how s 75A operated, given the Supreme Court's judgment in *Project Blue.* She added that "what they are calling an annuity is a valueless device and no weight can be placed on it".

158. Both Counsel also referred to the anti-avoidance case law, but I have not found it necessary to set out those submissions, given my conclusions on the other points before the Tribunal.

**The Tribunal's view**

159. I agree with Miss Wilson that, if the scheme had not already fallen at the earlier hurdles of s 45(3) and (3A), it would have been caught by s 75A. That is because (a) Mr Hickey's comparator is incorrect and (b) there is no annuity. Either would be sufficient for HMRC to succeed, as I explain below.

***The comparator***

160. Mr Hickey submitted that the SDLT payable under the scheme had to be compared with the SDLT which would have been paid by PFL, because that company was "P" in s 75A. As Miss Wilson said, that submission ignored *Project Blue*. Lord Hodge stated at [44] (emphasis added):

> "The words of section 75A by themselves do not disclose who is V and who is P in a particular case. But the mischief which the provision addresses and the context of the provision within Part 4 of the FA 2003 provide the answer. The court adopts the purposive approach which the House of Lords sanctioned in *Barclays Mercantile Business Finance Ltd*, to which I have referred in para 34 above. The explanatory notes on clause 70 of the Finance Bill 2007 explained that the provision was introduced to counter avoidance schemes which have been developed to avoid payment of SDLT. It appears to be drafted in deliberately broad terms to catch a wide range of arrangements

> which result in tax loss…The task is to identify where the tax loss has occurred as a result of the adoption of the scheme transactions in relation to the disposal and acquisition of the relevant interest or interests in land. This in turn involves identifying the person on whom the tax charge would have fallen if there had not been the scheme transactions to which subsection (1)(b) refers and which exploited a loophole in the statutory provisions."

161. The "person on whom the tax charge would have fallen if there had not been the scheme transactions" is the Appellants.

162. I therefore agree with Miss Wilson that "P" is the Appellants, and the comparison directed by s 75(1)(c) is between:

(1) the SDLT payable under the scheme, which would have been nil had it succeeded in overcoming the hurdles of s 45(3) and (3A); and

(2) the SDLT which would be payable by the Appellants under a notional sale of the Property by V (the Vendors) to P (the Appellants).

163. The SDLT that would be payable under that notional transaction depends on the consideration. That is determined by s 75A(5), which provides as follows:

> "The chargeable consideration on the notional transaction mentioned in subsections (1)(c) and (4)(b) is the largest amount (or aggregate amount)—
>
> (a) given by or on behalf of any one person by way of consideration for the scheme transactions, or
>
> (b) received by or on behalf of V…by way of consideration for the scheme transactions."

164. In relation to (a), Miss Wilson submitted that on the Appellants' own case the Bond was worth £590,850, and thus this was the "largest amount" given by any one person by way of consideration for the scheme transactions. Mr Hickey did not challenge this reading of the provision. In particular, he did not seek to argue that the Bond should be taken to be worth less than its face value, given that it was unsecured and could not be redeemed, and I have not further considered that point. The SDLT on that consideration would be £23,634 (£590,850 x 4%).

165. In relation to (b), the parties agreed that the "largest amount" the Vendors received "by way of consideration for the scheme transactions" was the £585,000 paid to them by the Appellants. The SDLT on that consideration would be £23,400.

166. Section 75A(5) requires that the higher figure be used, namely £23,634.

***There is no annuity***

167. There is a difference between (a) annuities and (b) instruments such as the Bond which pay interest. An annuity was defined by Mathew LJ in *Scoble v Secretary of State in Council for India* [1903] 1 KB 494 at 504 at the Court of Appeal, later affirmed by the House of Lords, as follows:

> "An annuity means generally the purchase of an income, and usually involves a change of capital into income, payable annually over a number of years."

168. Interest was defined by Rowlatt J in *Bennett v Ogston* 15 TC 374 as "payment by time for the use of money", or in *Riches v Westminster Bank Ltd* [1947] AC 390 as "the accumulated fruit of a tree which the tree produces regularly until payment" per Viscount Simon, or "a payment which becomes due because the creditor has not had his money at the due date", per Lord Wright.

169. Although both annuities and interest are sometimes described as types of "annual payments", see for example Income and Corporation Taxes Act 1988, s 821, they are not identical.

170. The Appellants are not entitled to annual sum (an annuity); instead, they may receive interest on the Bond. The SDLT which would have been payable under the notional land transaction is therefore not calculated by reference to the annuity provisions in s 52.

171. I note that in *Hannah v HMRC* [2019] UKFTT 342 (TC) Judge Nicholl decided that the SDLT scheme she was considering did include an annuity, but the appellant in *Hannah* had covenanted to pay the vendors £383.84 in perpetuity for each calendar year, so the facts were entirely different.

### Conclusion on s 75A

172. For the reasons explained above, if the Appellants had succeeded on s 43(3) and (3A), they would have been caught by s 75A.

#### OVERALL CONCLUSION AND APPEAL RIGHTS

173. I find that the Appellants are liable to SDLT of £23,400. HMRC's assessment is confirmed.

174. This document contains full findings of fact and reasons for the Decision. If the Appellants are dissatisfied with this Decision, they have a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

175. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**ANNE REDSTON**

**TRIBUNAL JUDGE**

**RELEASE DATE: 12 NOVEMBER 2019**